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POINT PAPER

11 May 2001

SUBJECT: What You Should Know About the Berry Amendment

PURPOSE: To provide information regarding Berry Amendment limitations on the procurement of clothing and related items

FACTS:

- There are numerous laws regarding the acquisition of foreign supplies, services, and construction materials. One such law is the Berry Amendment.
- The Berry Amendment applies only to DOD and has been included in DOD appropriations acts since 1941. As implemented in the DFARS, it generally restricts DOD's expenditure of funds for supplies consisting in whole or in part of certain articles and items not grown or produced in the United States or its possessions.
- The restrictions apply to food; clothing; tents, tarpaulins, or covers; cotton and other natural fiber products, or wool; woven silk or woven silk blends; spun silk yarn for cartridge cloth; synthetic fabric or coated synthetic fabric; canvas products; individual equipment manufactured from or containing any of the listed fibers, yarns, fabrics, or materials; certain specialty metals; and hand or measuring tools.
- Unless a specific exception applies, contracting officers must apply the Berry Amendment to actions at or above the simplified acquisition threshold.
- The Berry Amendment can be waived when the Agency's Secretary determines that the supplies cannot be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States or its possessions at U.S. market prices. The Secretary of the Army delegated to the ASA(ALT) the power to make the necessary determination that would result in the waiver of the Berry Amendment restrictions. See AFARS 25.7002. On 1 May 2001, the Secretary of Defense rescinded all redelegations.
- Therefore, all waiver determinations require approval by the Secretary of the Army.
- There is language in the legislative history of the Berry Amendment indicating that Congress intended for Defense agencies to exercise extreme caution in granting waivers, a fact that has been noted by the GAO. See Canadian Commercial Corporation/Freeze-

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Dry Foods, Ltd., B-266207, February 5, 1996, 96-1 CPD 38; Dash Engineering, Inc.;  
Engineered Fabrics Corp.--Recon., B-246304.12; B-246304.13, September 27, 1993,  
93-2 CPD 184.

- The recent controversy over the procurement of the new Army Black Beret illustrates some of the pitfalls associated with waivers of the Berry Amendment restrictions. In that case, there was insufficient capacity among domestic beret manufacturers to meet the Army Chief of Staff's requirement that all soldiers be issued the new berets by June 14, 2001. DLA (the procuring agency) obtained a Berry Amendment waiver so that some of the requirement could be obtained from manufacturers outside of the United States. One of the foreign manufacturers (a British company) has a factory in China, and many of the berets destined for the Army were being manufactured there. When this fact became public, Congress questioned the propriety of the Berry Amendment waiver. The House Small Business Committee held hearings questioning the its propriety.
- In the wake of the beret procurement controversy, it appears that, in the foreseeable future, Congress will scrutinize Berry Amendment waivers much more carefully than it has in the past.

RELEASED BY: EDWARD J. KORTE  
  
COMMAND  
COUNSEL  
AMCCC  
DSN: 767-8032

ACTION  
OFFICER:

JOSHUA  
KRANZBERG  
ASSOCIATE COUNSEL  
  
AMCCC-B-PL  
DSN: 767-8808

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